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In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA AND
BENJAMIN R. CIVILETTI, ATTORNEY GENERAL
OF THE UNITED STATES, APPELLANTS

v.

STATE OF MISSISSIPPI

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion (App. A, *infra*, 1a-35a) and judgment (App. B, *infra*, 36a-37a) of the District Court for the District of Columbia (Civ. No. 78-1425) are unreported.

JURISDICTION

The three-judge district court, convened pursuant to Section 5 of the Voting Rights Act of 1965, 42

U.S.C. 1973c and 28 U.S.C. 2284, issued its declaratory judgment on June 1, 1979. The United States filed its notice of appeal (App. C, *infra*, 38a-39a) on June 13, 1979. The jurisdiction of this Court is invoked under 42 U.S.C. 1973c. *Beer* v. *United States*, 425 U.S. 130 (1976); *City of Richmond* v. *United States*, 422 U.S. 358 (1975).

STATUTE INVOLVED

Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, * * * such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, * * * and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or

> procedure may be enforced without such proceeding if [it] * * * has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission [.] * * * Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

QUESTIONS PRESENTED

1. Whether the State of Mississippi sustained its burden of proving that its legislative reapportionment plan of 1978 does not effect a retrogression in the access of black voters to the electoral process and in the ability of black voters to cast an effective vote for representatives of their choice.

2. Whether the State of Mississippi sustained its burden of proving that its legislative reapportionment plan does not purposefully dilute the voting strength of black voters, abridging their opportunities to participate in the electoral process and to elect representatives of their choice.

STATEMENT

A. Background

The State of Mississippi has a quadrennially elected bicameral legislature consisting of a Senate with 52 seats and a House of Representatives with 122 seats (App. A, *infra*, 12a, Finding No. 30).

According to the 1970 census, blacks in Mississippi comprise 36.8% of the total population of the State, and 31.5% of the State's voting age population (*ibid.*, Finding No. 32). Between Reconstruction and the 1975 elections, only one black served in the legislature. In the present legislature, elected under a temporary court-ordered plan in 1975, four seats in the House and none in the Senate are occupied by blacks (*id.* at 3a and 14a, Findings Nos. 4 and 39).

Legislative reapportionment in Mississippi has been the subject of litigation in the federal courts since 1965, and the matter has been before this Court in one form or another on six occasions. See *Connor* v. *Johnson*, 402 U.S. 690 (1971); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Coleman*, 425 U.S. 675 (1976); *Connor* v. *Finch*, 431 U.S. 407 (1977); and *Connor* v. *Coleman*, No. 78-1013 (orders of March 26 and May 21, 1979). Between 1965 and 1979, neither the legislature nor the three-judge court in Mississippi (hereinafter, "the *Connor* court") was able to formulate a permanent plan for apportioning the state legislature that could pass muster under both Section 5 of the Voting Rights Act and the Constitution.

The history of the present action begins in June 1975. There was a brief hiatus, just prior to the 1975 quadrennial elections, when no apportionment plan was in effect, the Attorney General having interposed an objection to the legislature's most recent effort. At this time, the United States was permitted to

intervene as plaintiff in the *Connor* litigation to participate in the proceedings leading to adoption of a plan for the 1975 elections. See *Connor* v. *Finch*, 431 U.S. 407, 412 & n.8 (1977). The *Connor* court then adopted a plan "that was substantially similar to both the 1971 court-ordered plan previously vacated by this Court and the 1975 legislative plan challenged by the Attorney General" (*Connor* v. *Coleman*, No. 78-1013 (Mar. 26, 1979) (Marshall, J., dissenting)). It relied heavily on the use of multimember districts (*ibid.*). This was the plan under which the last elections (prior to the instant action) were held. No appeal was taken from the 1975 court-ordered plan, but the district court "professed its intent to avoid unnecessary delay in preparing a permanent plan for the 1979 state elections" (*ibid.*), and promised, in its order of July 8, 1975, dealing with the temporary plan for elections of that year, to order special elections, under the permanent plan, where the 1975 plan could be shown to have caused irreparable injury. See *Connor* v. *Finch*, 419 F. Supp. 1089, 1114 (S.D. Miss. 1976), modifying 419 F. Supp. 1072, rev'd, 431 U.S. 407 (1977).

In 1976, after some delay (see *Connor* v. *Coleman*, 425 U.S. 675 (1976)), the *Connor* court entered a plan for the 1979 elections, ordering special elections in two districts; but that plan was invalidated on direct appeal to this Court. *Connor* v. *Finch*, 431 U.S. 407 (1977). The basis for this Court's reversal of the 1976 plan was its failure to meet one-person-one-vote requirements. This Court did, however, dis-

cuss the private plaintiffs' and United States' challenges to several of the districts based upon claims of unlawful dilution of black voting strength (*id.* at 421-425), and noted (*id.* at 425) that "[t]he District Court could have avoided this [dilution] charge by more carefully abiding by its stated intent of adopting reasonably contiguous and compact districts, and by fully explaining any departures from that goal." This Court remanded the matter to the three-judge Mississippi court, urging (*id.* at 425-426) (footnote omitted) that in drawing still another plan, the district court

> make every effort not only to comply with established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges. In view of the serious questions raised concerning the purpose and effect of the present decree's unusually shaped legislative districts in areas with concentrations of Negro population, the District Court on remand should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished.

B. The Reapportionment Plans of 1977-1978

As a result of this Court's decision in *Connor* v. *Finch, supra*, there was again a hiatus: in the summer of 1977, Mississippi had no apportionment plan, court-ordered or legislated, to govern the 1979 elections. The hiatus could be filled by a legislative reap-

portionment plan, duly cleared by either the Attorney General or the United States District Court for the District of Columbia, pursuant to Section 5 of the Voting Rights Act of 1965, by the first week of June 1979. Barring successful passage and clearance of such a plan by that date, the gap would have to be filled by a new and valid court-ordered plan.

In August 1977, the *Connor* court ordered all parties to submit proposed plans adhering to the guidelines set by this Court in *Connor* v. *Finch*, *supra*, 431 U.S. 407. (See App. A, *infra*, 4a, Finding No. 7.) In the Mississippi legislature, a Special Joint Committee on Reapportionment convened, elected a chairman, employed experts, and commenced to formulate plans to be submitted both to the *Connor* court and to the legislature. The Committee's first efforts (September 1977 to early December), which included public hearings, produced plans based upon census enumeration districts ("EDs"). Because the *Connor* court preferred plans based upon voting precincts, the Committee and its experts converted both sets of plans to reflect precinct lines. Early in March 1978, the State tendered its precinct plan to the *Connor* court, and later the same month, the legislature passed a similar precinct plan ("the Statutory Plan") (App. A, *infra*, 4a-8a, Findings Nos. 8-18, 22-23; Affidavit of William A. Allain, Ex. A to [Plaintiffs'] Memorandum in Support of Motion for an Expedited Hearing on the Merits). Meanwhile, in addition to the State's ED Plan (D.-I. Exs. 7-11) and the State Precinct Plan (D.-I. Ex. 4), four other plans were placed before the *Connor* court: the

Plaintiffs' Plan (D.-I. Exs. 42, 44, and as revised, D.-I. Ex. 3); the ED Plan (D. Exs. 3 and 3A) and Precinct Plan submitted by the United States (D. Exs. 4 and 5); and, finally, the Plan of the Special Master (see Allain Affidavit, *supra*, at 12).

On June 1, 1978, the State of Mississippi submitted its Statutory Plan to the Attorney General for Section 5 clearance (App. A, *infra*, 9a, Finding No. 25.) The *Connor* court, meanwhile, directed the parties to confer and arrive at a plan that could be incorporated in a consent decree (*id.* at 8a-9a, Finding No. 24).

On July 31, 1978, the Assistant Attorney General for the Civil Rights Division, as the delegate of the Attorney General, interposed an objection, under Section 5, to Mississippi's Statutory Plan. The State promptly filed this suit in the United States District Court for the District of Columbia (*id.* at 9a-10a, Findings Nos. 25-26) and, on August 2, 1978, moved the *Connor* court to stay its hand and not order a plan into effect until the Section 5 proceeding had run its course (*Connor* v. *Coleman*, No. 78-1013 (Mar. 26, 1979) (Marshall, J., dissenting)). Negotiations toward a *Connor* settlement proceeded, however. At the end of August 1978, the legislature, by informal poll, assented to submission of a plan, which had been agreed to by the parties and recommended by the Joint Committee, as a fall-back in the event the Statutory Plan failed to receive clearance from the district court in the District of Columbia

(*id.* at 9a, Finding No. 24). Soon after this, however, negotiations broke down "when the State insisted that the parties agree not to introduce the settlement plan as evidence before the D.C. court" (*Connor* v. *Coleman*, No. 78-1013 (Mar. 26, 1979) (Marshall, J., dissenting)). As of mid-September 1978, therefore, there was still no reapportionment plan in effect.

In October 1978, after the present case had been tried but before it was decided, the *Connor* plaintiffs asked the Mississippi court to enter a final judgment. When, in November 1978 and January 1979, that court indicated that it would enter no judgment until it became urgent because of imminent elections, the *Connor* plaintiffs, supported by the United States, sought this Court's leave to petition for a writ of mandamus. This Court granted leave to file the petition, but postponed action on it for 30 days, instructing the *Connor* court to enter a plan "forthwith" (*Connor* v. *Coleman*, *supra*). Accordingly, on April 13, 1979, the Mississippi court entered a final judgment that is, in all material respects, the plan earlier agreed to by the parties (App. A, *infra*, 11a, Finding No. 29 & n.1; *Connor* v. *Finch*, 469 F. Supp. 693 (S.D. Miss. 1979)).[1]

The present action for Section 5 clearance of the Statutory Plan, filed August 1, 1978, was heard on

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[1] This Court subsequently denied the petition for a writ of mandamus, noting *inter alia* that "[t]he Clerk [of the district court] has * * * stated that all parties to the litigation have announced in open court that there will be no appeal [from the April 13, 1979 judgment]." *Connor* v. *Finch*, No. 78-1013 (May 21, 1979).

an expedited basis between September 18 and September 27, 1978 (App. A, *infra*, 1a). On the first day of trial, the motion of ten black citizens and registered voters of the State of Mississippi to intervene as defendants was granted (*id.* at 10a, Finding No. 27). On June 1, 1979, the United States District Court for the District of Columbia filed Findings of Fact and Conclusions of Law (App. A, *infra*) and entered a judgment declaring that Mississippi's statutory reapportionment plan has neither the purpose nor the effect of denying or abridging the right to vote on account of race (App. B, *infra*, 37a). The defendant-intervenors made a timely application to the district court for a stay of the judgment pending appeal. When that application was denied, they applied to this Court, supported by the United States (No. A-1067).[2] The United States filed its notice of appeal on June 13, 1979 (App. C, *infra*, 38a-39a).[3] This Court denied the application for a stay on June 18, 1979.

C. The District Court's Opinion

The district court found that the experts who initially drafted the Statutory Plan had been instructed, *inter alia*, to avoid diluting black voting strength. This instruction was implemented principally by

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[2] The effect of a stay would have been the holding of elections under the *Connor* final judgment plan. The last day to qualify for the 1979 primary elections was Friday, June 8, 1979, less than a week after judgment in the present case.

[3] The defendant-intervenors filed their notice of appeal on June 6, 1979.

using north-south rather than east-west dividing lines in the western portion of the State, thereby avoiding the combination of heavily black counties with predominantly white counties to the east. Adjustments were subsequently introduced by the Joint Committee to avoid placing two incumbents in a single district ("dual incumbencies") (App. A, *infra*, 5a-6a, Findings Nos. 12-15). The resulting plan provides 36 districts that have a voting age population ("VAP") in which blacks are a majority—26 House districts and 10 Senate districts (*id.* at 17a, Finding No. 46 (Table)). The court found, however, that in order for blacks to have a reasonable opportunity to elect representatives of their choice, a district should in most instances have a black VAP of 60% or a black total population of 65%. Although formal barriers to voting no longer exist in Mississippi, the present effects of past discrimination are reflected in low black registration and turnout that, together with majority primaries and racial bloc voting, make it unlikely that blacks have a realistic opportunity to elect representatives of their choice in districts having less than this percentage of black voters (*id.* at 12a-14a, Findings Nos. 31-39). The Statutory Plan has 16 districts with black VAP majorities of 60% or more, 14 for the House and two for the Senate (*id.* at 15a, 16a, 26a-27a, Findings Nos. 44, 46 and 49).

This Court's decision in *Beer* v. *United States*, 425 U.S. 130 (1976), the district court acknowledged, sets forth a two-part test for the racially discriminatory effect prohibited by Section 5: Whether the plan would

lead to a retrogression in the position of racial minorities, or whether it unconstitutionally dilutes black voting strength (App. A, *infra*, 29a, 31a, Conclusions Nos. 10 and 16). Unconstitutional dilution exists when "heavy black population concentrations are unnecessarily fragmented and dispersed," and when black populations are combined in heavily white districts in a manner calculated to deny blacks an opportunity to elect candidates of their choice (*id.* at 30a, Conclusion No. 14). In a declaratory judgment action under Section 5, the Court held, the burden of proof is on the State (*id.* at 29a, Conclusion No. 9).

For purposes of measuring retrogression, the district court held (*id.* at 31a-32a, Conclusion No. 19), "[t]he settlement plan, adopted by the *Connor* Court an April 13, 1979, must now be considered the preexisting plan and the benchmark with which to compare the statutory plan." The Settlement Plan has three more black VAP majority districts than the Statutory Plan—two for the House and one for the Senate (*id.* at 16a-17a, 26a-27a, Findings Nos. 46 and 49). None of these three has a black VAP majority of 60% or more; indeed, both plans have the same number of districts with 60% or more black VAP majorities (*ibid.*). Even if all the districts urged upon the court by the defendant and defendant-intervenors were adopted, it would not effect a change in the net number of 60% black VAP districts (see *id.* at 18a-26a, Finding No. 47). Despite evidence pointed out by the United States and the defendant-intervenors indicating that concentrations of active

black voters in two districts in the Settlement Plan with black VAP majorities of less than 60% would give blacks in those districts a realistic opportunity to elect representatives of their choice, notwithstanding that the black VAP majority was less than 60% (see page 17, *infra*), the district court concluded that the differences between the two plans are "insubstantial" (App. A, *infra*, 26a-27a, Finding No. 49) and "insignificant" (*id.* at 32a, Conclusion No. 20). "This conclusion to disregard insignificant differences," the court held, "is further supported by the fact that legislative reapportionment is the preferred vehicle for reapportionment * * *" (*id.* at 32a-33a, citing *Wise* v. *Lipscomb*, 437 U.S. 535, 539 (1978)).

The district court further held that apparently dilutive configurations pointed out by the defendant and defendant-intervenors have been explained and justified by neutral considerations governing reapportionment, such as compactness, unwillingness to divide a city too deeply, or adherence to uniform use (in most of the state) of east-west lines (App. A, *infra*, 18a-26a, Finding No. 47). Had representatives of the black community called attention to the alterations they wished to have made in these districts prior to December 1977, the court found, the Joint Committee, which had been responsive to suggestions submitted at the public hearings, would probably have made the requested changes (*ibid.* and *id.* at 8a, Finding No. 21). No evidence was presented that suggests a discriminatory purpose on the part of the "principal actors in the development of S.B. 3098 and H.R. 1491" (*id.* at 33a, Conclusion No. 22).

Thus, the court concluded that the plans can not be unconstitutional and that they do not reflect the discriminatory purpose prohibited by Section 5.

The district court accordingly granted the State of Mississippi a judgment declaring that its Statutory Plan met the requirements for clearance under Section 5 of the Voting Rights Act of 1965.

THE QUESTIONS ARE SUBSTANTIAL

1. The district court erred in adopting the most restrictive possible reading of the "retrogression" principle of *Beer* v. *United States*, 425 U.S. 130 (1976), thus depriving black Mississippi voters of much of the protection promised by Section 5 of the Voting Rights Act of 1965. That restrictive reading led the court to hold that there were no material differences between the Settlement Plan and the Statutory Plan as long as they contained the same number of legislative (*i.e.*, House or Senate) districts with black VAP majorities of 60% or more. All differences between the two plans, regardless of their actual impact upon the ability of blacks to elect representatives of their choice, were ignored or dismissed by the district court as "insignificant" or "insubstantial."

There are eight districts in dispute, five in the House and three in the Senate. All eight are in the western and central portions of the State where blacks are most heavily concentrated. The retrogression that we contend was introduced by the Statutory plan, relative to the Settlement Plan, falls into four categories: (1) The Settlement Plan provides

for black VAP majority House districts in Warren and rural Hinds counties, while the Statutory Plan does not; (2) the Settlement Plan creates a House district with more than 60% black VAP in Marshall County, while the Statutory Plan does not; (3) the House districts created by the Statutory Plan for Leflore and Adams counties, and one of the Senate districts for Hinds County provided in that plan, although containing 60% or more black VAP, are lower in black VAP percentages, less logical, and politically less viable for blacks than their counterparts in the Settlement Plan; and (4) the Senate districts created by the Statutory Plan for two additional groups of counties, although statistically almost indistinguishable from their counterparts in the Settlement Plan, are in fact far more dilutive than those counterparts because they represent illogical and unnecessary fragmentations of concentrations of black activism and voting strength.[4]

(a) There is no legal basis for the district court's conclusion that the loss of two black VAP majority House districts is insubstantial and not retrogres-

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[4] The areas referred to above are, respectively, a three-county group—Washington, Sharkey, and Issaquena counties —and a six-county area consisting of Humphreys, Holmes, Madison, Yazoo, Attala, and Leake counties. The districts for which we contend are Settlement Plan Senate District No. 14 in Washington County (P. Ex. 35, p. 4, and D.-I. Ex. 33 (map)) and Settlement Plan Senate District No. 23 for Holmes, Humphreys, and Yazoo Counties (P. Ex. 35, p. 5 and D.-I. Ex. 31 (map)).

sive.[5] The court adopted the view of an expert witness testifying for the United States that, as a general rule, given polarized racial bloc voting, blacks have a 50-50 chance of electing a representative of their choice only if they constitute 65% of the population and 60% of the voting age population in the district (App. A, *infra*, 13a). Because the Settlement Plan's House districts for Warren and Hinds counties would have black VAPS of 56.22% and 59.02% respectively,[6] the court concluded that the Statutory Plan, which has no majority black House districts in those counties, represents no retrogression.[7] This excessively rigid application of the 60%

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[5] The court's finding that there is a difference of three black VAP majority districts is based upon a tabular comparison of the Settlement and Statutory plans appearing in the post-trial brief of the defendant-intervenors and incorporated in Finding No. 46 (App. A, *infra*, 17a), showing *inter alia* that the Statutory Plan has 10 black VAP majority Senate districts, and the Settlement Plan (P. Ex. 35), 11. A closer examination of the Settlement Plan shows that it frequently lists only population, not VAP figures. For the tabulation, the Kemper-Lauderdale-Noxubee Senate District No. 20 in the Settlement Plan was apparently assumed to have a black VAP majority because it has a black population of 56.08%. The almost identical district, Senate District No. 32 in the Statutory Plan, however, shows (P. Exs. 1 and 4A) a black population of 56.39%, but a black VAP of 49.27%. The argument in this Jurisdictional Statement, therefore, is based on the premise that the Statutory Plan has two, not three, fewer black VAP majority districts, both in the House: Warren County and rural Hinds County.

[6] P. Ex. 35, pp. 18 and 20.

[7] App. A, *infra*, 19a, Finding No. 47(a) (Warren Co.). The court made no such specific finding as to the rural Hinds County House district, although the logic would appear to

"breakpoint" ignores both mathematical and political realities.

With a majority of the voting age population, blacks have, if not a 50-50 chance, at least some possibility of electing a candidate of their choice; with less than half the vote, they have none. Many factors besides numbers, moreover, bear upon the possibilities of affecting the electoral process. Dr. Loewen, the government's expert, indicated that these factors include, *e.g.*, incumbency, strength of campaign organization, and the qualifications of individual candidates (Tr. 1410-1411). Witnesses also testified that blacks have some chance to elect representatives of their choice in the Settlement Plan's House districts in both Warren and Hinds Counties. The Warren County district includes the activist community of Vicksburg, which has recently succeeded in electing a black to the City Council (Tr. 907-908). The Hinds County district would include two predominantly black towns, Bolton and Edwards, both of which now have predominantly black city governments (*id.* at 835-837).

Our submission, moreover, is consistent with this Court's approach in *Beer* v. *United States*, 425 U.S.

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apply equally to both. Instead, the court found (*id.* at 20a, Finding No. 47(b)) that the drafters of the Statutory Plan deleted the rural Hinds County black district at the request of Representative Buckley, a black legislator. This is simply erroneous. The drafters reduced the number of black majority House districts in the City of Jackson at the request of Mr. Buckley, who believed that five such districts diluted the black vote by spreading it too thinly (Tr. 205-206).

130 (1976). In that case, the Court recognized (*id.* at 142) that only a VAP majority gave blacks a genuine likelihood of electing a city councilman of their choice, but still acknowledged as ameliorative both the increase from one to two black *population* majority districts and the increase from zero to one district with a black VAP majority. It follows that if the next plan deleted even the population majority district, it would be retrogressive. By analogy, in the present case, loss of a black VAP majority district (though not one reaching 60%) constitutes retrogression.

(b) The district court's notion that a small degree of retrogression, *i.e.*, loss of two majority black VAP districts, should be disregarded out of deference to the legislature's paramount role in apportionment matters (App. A, *infra*, 32a-33a, Conclusion No. 20) is equally without basis in law. That conclusion is apparently based upon this Court's reaffirmation, in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), of the proposition that a valid statutory reapportionment plan will always supersede a court-ordered plan. Nothing in *Wise* v. *Lipscomb*, however, equates a preference for legislative reapportionment with according a statutory plan a presumption of validity in a Section 5 proceeding.

The Voting Rights Act of 1965 was intended to prevent covered states from diminishing, even in a small way, the opportunities for blacks to participate in the political process. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 566 (1969). In order to

obtain a declaratory judgment under Section 5, the plaintiff jurisdiction bears the burden of proof that the plan does not have the prohibited effect. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966); *City of Petersburg* v. *United States*, 354 F. Supp. 1021, 1027-1028 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973).[8] The district court in this case, while formally acknowledging that the burden of proof was the plaintiff's (App. A, *infra*, 29a, Conclusion No. 9), shifted the effective burden of proof to the defendants: having decided to accord the Statutory Plan a presumption of validity, the court then held that the defendants had failed to show it was retrogressive enough to be disapproved under Section 5. Taken to its logical extreme, the district court's theory of insubstantial retrogression could lead to a gradual erosion of the gains blacks have achieved since 1965 in acquiring access to the political process.

(c) The district court erred as a matter of law in failing to recognize retrogression with respect to the six additional disputed districts. It seems fair to say that, for purposes of its retrogression analysis, the court considered the number of 60% black VAP dis-

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[8] In *City of Petersburg, supra*, 354 F. Supp. at 1028, the district court noted that opponents of the legislation in question "properly characterized the burden of proof placed on affected governmental units in the covered areas as raising a 'presumption of illegality' with regard to changed election procedures."

tricts (finding them equal), and the number of majority black VAP districts (finding the differences insubstantial), but gave no consideration at all to those additional districts in which the Statutory Plan substantially diminished blacks' realistic opportunities (relative to the Settlement Plan) to elect representatives of their choice.

For example, both the Statutory Plan and the Settlement Plan provide for one black VAP majority House district in Leflore County. The Statutory Plan's district has a black VAP of 64.26% (P. Ex. 4B), while the Settlement Plan's district has a black VAP of 71.72% (P. Ex. 35, p. 15). Perhaps more significant than the statistical difference, however, is the testimony by Henry Kirksey (Tr. 927-931) and that of David Jordan, a resident of Leflore County (Tr. 992-1029), showing that the manner in which Statutory Plan Districts 34 and 35 (D.-I. Ex. 20) divide the black community in Greenwood seriously impairs black political organization. In addition, the testimony is that black political power is far greater in a black majority district comprised of urban precincts than in a district in which the black majority resides in rural areas. In the Mississippi delta, rural blacks still fear reprisal for registering or attempting to vote (Tr. 928-931, 999). To some extent, that fear remains even when rural blacks move to the city (*id.* at 999). Recent difficulties in getting black students registered in Leflore County (*id.* at 993-997), moreover, suggest that present discrimination as well as present effects of past discrimination still inhibit black voting potential in that county. The result is that a black

VAP of 65%, when it is made up of plantation dwellers, is not enough in Leflore County to give blacks a reasonable opportunity to elect candidates of their choice; the Settlement Plan's House District No. 35 (see D.-I. Ex. 21), by maintaining the Greenwood black concentration intact, does offer blacks that chance (see Tr. 927-931, 1022).

The district court's response to challenges of this nature was to justify the Statutory Plan's districts in terms that—while they may have some bearing upon the issue of discriminatory purpose—have no bearing upon the question whether one plan offers less opportunity than another for blacks to realize their political potential. No one contends, for example, that the Settlement Plan is defective from the point of view of compactness of districts or division of cities; if the Statutory Plan's districts are retrogressions, then, it is irrelevant that those districts follow traditional east-west lines (Hinds Co.), or (if it is true) are marginally more compact or more inclusive of complete cities (Marshall, Leflore) than the Settlement Plan (App. A, *infra*, 19a-22a).[9]

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[9] The contention that the Settlement Plan creates heavily black districts only by diluting black strength in adjacent districts would, of course, have a bearing on the retrogression issue (see App. A, *infra*, 19a-21a) (Hinds, Adams, and Leflore Cos.), but closer examination proves this "justification" wholly illusory. For example, it is possible to create only one majority black district in Leflore County; the issue is whether that district will have 72% black VAP, and its neighbor, 32% (Settlement Plan, P. Ex. 35) or whether one will have 64% black VAP, and its neighbor, 38% (P. Ex. 4B). The neighboring district, in other words, already has so small a percentage of blacks that it cannot be meaningfully diluted by a 6%—or a 10%—reduction.

Finally, the analysis of retrogression is part of the inquiry into racially discriminatory *effect*. If the effect of one plan is to diminish black voting strength as compared to another plan, there is retrogression, whether or not that effect might have been averted by earlier or more vigorous efforts on the part of blacks in Mississippi to call alternatives to the Joint Committee's attention (see App. A, *infra*, 18a-27a).[10] In any event, this rationale could not apply to the Attorney General, the defendant in this case, whose general responsibilities under the Voting Rights Act do not include assisting the Joint Committee in its day-to-day work or testifying at its hearings.

In sum, the district court did not deny that the challenged districts have a dilutive impact upon black voting strength. At best, it adopted the State's rationalizations of these effects against an attack based upon discriminatory purpose. But the court failed to recognize the relevance of these district-by-district challenges to the overall determination whether, compared to the Settlement Plan, the Statutory Plan substantially diminishes gains achieved by Mississippi blacks in obtaining access to the political process.

2. The district court erred in considering only the statewide impact of the Statutory Plan relative to the Settlement Plan, declining to accord significance to

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[10] As indicated in point 3, *infra*, we do not agree that the State had inadequate warning of the alternatives preferred by the United States or the defendant-intervenors, for the plans submitted in *Connor* and the depositions taken in that case raised most of the same issues ultimately raised here.

retrogression in the position of black voters in the counties that constitute the disputed districts. Loss of two majority black districts, for example, may seem insubstantial in state-wide terms, but it is of vital importance in Warren and Hinds Counties.

Counties are the most important units of local government in Mississippi. Although the boards of supervisors exercise the principal administrative functions, they have little legislative power. Legislation affecting the county is passed by a system of local or private bills (also called bills of local application) in the state legislature. As a result, the county delegation to the legislature plays a particularly crucial role. See *Connor* v. *Finch*, 419 F. Supp. 1072, 1074 (S.D. Miss. 1976), rev'd, 431 U.S. 407 (1977), citing *Mahan* v. *Howell*, 410 U.S. 315 (1973); *Connor* v. *Finch*, 431 U.S. 407, 418 (1977). For more than a decade, this was the reason offered for respecting county boundaries in legislative apportionment even though it resulted in use of either multimember districts or grossly malapportioned districts (*ibid.*). Even the present Statutory Plan was based upon instructions to avoid dividing counties more than necessary (*id.* at 413, n.10). Any reduction in the chances blacks have to elect a representative of their choosing to the delegation representing their county's interests in the legislature, then, must be viewed as seriously retrogressive.[11]

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[11] The contrast between viewing the Statutory Plan apportionment on a state-wide or a county-by-county basis is more apparent if the following figures are considered. There

3. The district court also erred in concluding that the Statutory Plan reflects no racially discriminatory purpose. This conclusion is based entirely upon the finding (App. A, *infra*, 26a, Finding No. 48) that the State's technical experts "acted with the purpose of creating black VAP majority districts" and "did not act with the intent or purpose of denying or abridging the right to vote * * * on account of race." Legislatures, not experts, adopt reapportionment plans and, as this Court noted in *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977), [d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." In determining that there was no racial purpose behind the Statutory Plan, the district court failed to give weight to the three most significant factors suggested in *Arlington Heights, supra*, 429 U.S. at 266-267: racially discriminatory effect, a "historical background * * * reveal[ing] a series of official actions taken for in-

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is only one county—Hinds—capable of generating more than one black VAP majority House District and one such Senate District. In all the other disputed districts, then, the issue is whether blacks will have any chance to elect one member of the county delegation to the House or *none* or to have a voice in electing the Senator who sits on his county legislative delegation or not. From this perspective, the matter is not de minimis by any standard. Moreover, every county in Mississippi is "covered" under Section 4 of the Voting Rights Act, and election changes affecting a single county would be subject to Section 5 clearance.

vidious purposes," and the "specific sequence of events leading up to the challenged decision".

(a) The record reflects that in each of the disputed districts, the State has unnecessarily fragmented "what could otherwise be * * * cohesive voting communit[ies]" (*Robinson* v. *Commissioners Court, Anderson County*, 505 F.2d 674, 679 (5th Cir. 1974)), and combined portions of heavily, often activist, black areas with heavily white areas.[12] The district court's justifications for these dilutive configurations are neither consistent nor rational. For example, although a major city is kept intact in only one of the five disputed Statutory Plan House districts mentioned above (Marshall Co.-Holly Springs), the district court justified the Leflore and Marshall County House districts on the ground that suggested alternatives divide major cities (App. A, *infra*, 21a-23a, Finding No. 47(1)(d) and (e)). Again, the district court took at face value testimony that the decision to draw north-south district lines in the delta was evidence of a

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[12] For example, see Tr. 279-283, 821-823 (Warren Co.); Tr. 332-333, 831-834, 955-958 (rural Hinds Co.); Tr. 334-335, 845-855 (Leflore Co.); Tr. 838-845, 979-984 (Adams Co.); Tr. 856-860 (Marshall Co.). The Statutory Senate districts in Washington-Sharkey-Issaquena divide the black concentration in the City of Greenville (Tr. 888-892, D.-I. Exs. 32 and 33); a "seahorse" shaped Senate district in the Jackson area of Hinds County pairs poor blacks with an affluent white suburb, when more logical configurations would not do so (Tr. 871-875, D.-I. Exs. 28 and 29); and the Senate district for Holmes-Madison-Yazoo combines the Holmes County blacks with an increasingly white, noncontiguous segment of Madison County (Tr. 883-888, 1204-1206; P. Ex. 5).

purpose to avoid dilution (App. A, *infra*, 5a, Finding No. 13; Tr. 253-254). Yet rigid adherence to that decision results in creation of two elongated delta Senate districts in Washington, Sharkey, and Issaquena Counties—districts in which no black can successfully campaign (Tr. 1096). Moreover, a dilutive configuration in non-delta rural Hinds County is rationalized (App. A, *infra*, 20a, Finding No. 47 (1)(b)) as an adherence to traditional east-west district lines.

(b) The district court took the position that the State's experts acted without discriminatory purpose when they declined to adopt suggested alternatives called to their attention after early December 1977 (App. A, *infra*, 19a, 33a, Finding No. 47(1)(a) and Conclusion No. 22) although the plan was not passed until March 1978. Quite apart from the fact that virtually all the alternatives appeared in the plans of the *Connor* parties [13] (in most cases in plans filed in October 1977), it is far from clear what compelling purpose required the Joint Committee to cut off all consideration of alternatives in mid-December. Indeed, the experts were apparently denied authority to make revisions, in the process of drawing up the precinct plan, based upon challenges that had arisen during *Connor* depositions in December and January (Tr. 345). Arguably, this cut off contributions to

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[13] *E.g.*, Tr. 370 (Warren Co.); Tr. 710-712 (rural Hinds Co.); Tr. 843-844 (Adams Co.); Tr. 877-879 (Hinds Co.-Senate). The Marshall County House districts appearing in the Settlement Plan derive from the Special Master's Plan (Tr. 1492).

the legislative process by the very blacks who had the most thorough and longstanding relationship to Mississippi apportionment problems.

Mississippi's statutory reapportionment plan was not devised or enacted upon a clean slate. Historically, state action in Mississippi has denied and abridged blacks' access to the political process. The reapportionment of 1978 is not the first effort by the State to create districts which would pass muster under Section 5 or the Constitution. In view of this history, the specific events leading up to this plan's adoption, and the evidence of unjustified dilutive effect, the district court erred in rejecting the contentions that the plan evidenced racially discriminatory purpose.

4. This case remains vital and important although the 1979 elections will have taken place by the time this Court has an opportunity to review the Statutory Plan. While Mississippi may have an obligation, under its own constitution, to reapportion again after the 1980 Decennial Census, the Statutory Plan in issue does not expire until it is superseded. The history of the past 14 years offers little assurance that Mississippi will reapportion soon enough after 1980 to supplant the present Statutory Plan with another for the 1983 quadrennial elections, or, if it does, that the new plan itself will not be suspended by further litigation.

Even assuming that an expeditious new reapportionment is likely, the present plan, in our view, is sufficiently dilutive and retrogressive to justify special elections in the disputed districts once the declaratory

judgment clearing the plan under Section 5 has been vacated. Those districts, while representing only a relatively small proportion of the total 122 House and 52 Senate Districts, are all located in the areas of heaviest black concentration and political organization, and therefore represent far more than a small fraction of black citizens' potential political strength.

Finally, assuming the Voting Rights Act is still in effect (or is extended again),[14] the Statutory Plan, if not struck down, will constitute the benchmark for evaluation of the next apportionment submitted under Section 5. The adverse effects of the district court decision in this case thus potentially prejudice blacks' access to the Mississippi political process well into the 1980's.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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SEPTEMBER 1979

[14] Under the Voting Rights Act of 1965, Section 4(a) (42 U.S.C. 1973b(a)), Mississippi will be able to "bail out" of coverage under Sections 4 and 5 of the Act when it can demonstrate that it has not had a "test or device," the purpose or effect of which was to "deny or abridge" the right to vote on the basis of race or color, for 17 years (*i.e.*, in 1982, if the State ceased using all such devices promptly in 1965).

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1425

[Filed Jun. 1, 1979]

STATE OF MISSISSIPPI, PLAINTIFF,

vs.

UNITED STATES OF AMERICA and GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, individually and in his official capacity, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was heard upon plaintiff's request for declaratory relief pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. It concerns the validity of the Mississippi Legislature's statutory legislative reapportionment plan, Miss. Laws, 1978, Chs. 515 and 535, H.B. 1491 and S.B. 3098, enacted in March, 1978. The hearing took place September 18-27, 1978, at which a record of more than 1500 pages of oral testimony was compiled and more than 80 exhibits received in evidence. The matter has been extensively briefed by all parties. Based on this record of the evidence presented and on the applicable law, we make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. *Factual and Procedural Background*:

1. In 1965, private plaintiffs filed a complaint entitled *Connor* v. *Johnson* in the Southern District of Mississippi (hereinafter referred to as "the *Connor* Court") challenging the constitutionality of Mississippi's 1962 legislative reapportionment plan for the Mississippi Legislature. The 1962 plan, as well as successive legislative attempts to redistrict Mississippi's legislature for the 1967 and 1971 elections, were held unconstitutional by the District Court. *Connor* v. *Johnson*, 330 F. Supp. 506 (S.D. Miss.), *supplemented in* 330 F. Supp. 521 (S.D. Miss. 1971); *Connor* v. *Johnson*, 265 F. Supp. 492 (S.D. Miss. 1967); *Connor* v. *Johnson*, 256 F. Supp. 962 (S.D. Miss. 1966). Consequently, court-ordered plans were implemented for the 1967 and 1971 elections.

2. In April, 1975, the Mississippi Legislature again attempted a reapportionment plan. The 1975 plan, although approved by the District Court, was declared ineffective by the Supreme Court until precleared pursuant to section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. *Connor* v. *Waller*, 421 U.S. 656 (1975). The Court's decision was without prejudice to a ruling by the *Connor* Court ordering the 1975 plan into effect if no other plan was formulated in time for the 1975 elections. *Id.* at 656-57.

3. On June 9, 1975, Mississippi submitted its 1975 reapportionment plan to the Attorney General for

section 5 preclearance, and on June 10, 1975, the Attorney General interposed an objection to the plan.

4. On June 25, 1975, the *Connor* Court announced its intention to formulate a "temporary plan for the election of Senators and Representatives for the 1975 elections." *Connor* v. *Waller*, Civ. No. 3830 (S.D. Miss. June 25, 1975). Then, by orders of July 8 and July 11, 1975, the *Connor* Court ordered into effect an apportionment plan for the 1975 quadrennial election (hereinafter referred to as the "1975 court-ordered plan"). The 1975 quadrennial election in the Mississippi House and Senate, held in accordance with the 1975 plan, resulted in the election of the current Mississippi Legislature.

5. On November 18, 1976, the *Connor* Court formulated an apportionment plan to take effect for the 1979 quadrennial election. *Connor* v. *Finch*, 419 F. Supp. 1072, 1089 (S.D. Miss.), *supplemented in* 422 F. Supp. 1014 (S.D. Miss. 1976) (hereinafter referred to as the "1976 court-ordered plan").

6. On May 31, 1977, the Supreme Court held that the 1976 court-ordered plan was unconstitutional on malapportionment grounds and returned the matter to the District Court with instructions to draft a new plan for the 1979 elections. *Connor* v. *Finch*, 431 U.S. 407 (1977). The Court cautioned the District Court on remand to draw legislative districts that were reasonably contiguous and compact or to explain precisely why, in a particular instance, that goal could not be accomplished. *Id.* at 425-26.

7. On August 2, 1977, the *Connor* Court directed the parties and invited the Mississippi legislature to file proposed plans for its consideration.

8. On August 9, 1977, the Governor of Mississippi called a special session of the legislature to consider the establishment of a joint legislative committee for the formulation of a legislative reapportionment plan.

9. At the August special session of the legislature, a Special Joint Committee on Reapportionment (hereinafter referred to as "the Joint Committee") was created and State Representative Thomas Campbell was elected its chairman. The Joint Committee retained as its special counsel, Mr. Jerris Leonard of Washington, D.C., former Assistant Attorney General of the United States for Civil Rights.

10. For the purpose of formulating the proposed plan, the Joint Committee interviewed experts on apportionment recommended by the Attorney General of Mississippi, Jerris Leonard, and Marshall Turner, Assistant Chief of the Demographic Census Staff of the United States Bureau of the Census. Of those interviewed, the Joint Committee selected Mr. Thomas Hofeller of California, Dr. Delbert Dunn of Georgia, Mr. Calvin Webb of New York, and Dr. Richard Morrill of the State of Washington. Each of those selected had prior experience in the formulation of reapportionment plans.

11. In addition to those experts selected from outside the state, the Joint Committee hired Earl Fortenberry, formerly the Director of the Legislative Serv-

ices Office of the State Senate, as Director of the Joint Committee's staff. Mr. Fortenberry had previously participated in the development of reapportionment plans for the Mississippi Senate. Fortenberry in turn hired as staff five people, including two blacks who were graduate students at Jackson State University, to assist with the efforts of the Joint Committee staff.

12. In formulating the plan, Joint Committee experts and staff were instructed by Special Counsel Jerris Leonard to minimize population deviations among districts, to avoid diluting black voting strength, to create one complete district in counties whose populations were large enough for the election of a representative or senator, to avoid splitting a county into more than two segments unless two or more districts could be derived from the same county, and to create compact and contiguous districts.

13. To avoid dilution of black voting strength, staff experts looked at the general demographic makeup of the state and noted that, as a general rule, black concentrations of population existed in western portions of the state. They further noted that, with certain exceptions, counties in the eastern portion of the state contained significantly fewer blacks. The experts tried to avoid the combining of counties in the western portion of the state, which contained heavy black population concentrations, with counties from the eastern portion of the state containing heavy white population concentrations. This goal was accomplished by running the district lines from north to south rather than from east to west.

14. Avoiding dual incumbencies was another goal which the Joint Committee attempted to achieve so long as it could be accomplished while observing the criteria given to the Committee staff for devising the plan. Hofeller and Fortenberry first prepared the plan without regard to incumbency. When requests for changes emanating from a dual incumbency situation arose, solutions were checked to assure that they did not adversely impact established criteria, especially those concerning the maintenance of *de minimus* deviation and avoidance of dilution of black voting strength. As a result of changes made in the plan to avoid dual incumbency, 46 senators and 106 representatives were preserved in their respective districts while 6 senators in three districts and 16 representatives in eight districts were pitted against other incumbents for reelection.

15. The Joint Committee developed a computer data base for the plan derived from 1970 census data acquired from the Bureau of the Census. The Joint Committee chose 1970 census data because it provided neutral data considered to be as accurate as possible, available for the entire state, collected by similar methodology throughout the state, available for geographic areas within counties as well as for whole counties in the state, and easily replicated and verified for any given district or area.

16. The Joint Committee initially based its plan upon Census Enumeration District Lines (ED's) rather than precinct lines. After developing the ED plans for the House and Senate, the Joint Committee submitted the plans to the *Connor* Court. Both the

Legislature and the Court expressed a preference for a plan using precinct lines as a means of avoiding voter confusion and of eliminating the need for re-registration of voters.

17. Because of the preference expressed for precinct lines, the Joint Committee staff was directed to convert the ED plan to a precinct plan by moving the boundaries of districts based on EDs to the nearest precinct line.

18. In order to convert the plans to precinct plans the Joint Committee found it necessary to obtain data on the EDs when split by precinct lines. The Joint Committee staff would draw the "split" of an ED on a Census Bureau map of the ED and forward the map to the Census Bureau. The Census Bureau would return population figures for both sides of the line splitting the ED. The Census Bureau, however, could not provide the exact racial composition of the split. This was determined by a computerized proportional allocation of black and white population within the ED to each side of the "split" line.

19. The resulting shift from the ED-based plan to a precinct-based plan was primarily a matter of refinement. It is not disputed that the basic configurations of the districts contained in the original ED plan and those of the resulting precinct plan are thus essentially the same.

20. The process used in developing the Joint Committee's plan was open to public participation and input. On October 11, 1977, the Joint Committee conducted public hearings on those plans presented to

the District Court in *Connor*, and, on November 28, 1977, the Joint Committee conducted hearings on its statutory ED plan. No hearings were conducted on the precinct plan subsequently drawn from the ED plan. The hearings of October and November, 1977, were well publicized in advance and opportunity was afforded to all interested parties to submit their suggestions and objections.

21. The Joint Committee was responsive to those suggestions ultimately submitted. Suggestions were incorporated into the plan whenever the resulting redistricting was feasible in view of other criteria governing the formulation of the plans.

22. After months of consultation, the House plan as drafted by Hofeller and the Senate plan as drafted by Fortenberry were adopted by the Joint Committee and were introduced on the floor of the legislature. These two plans, submitted as H.B. 1491 and S.B. 3098 (hereinafter referred to as the "statutory plan") were adopted without floor amendment.

23. On April 21, 1978, the Governor of Mississippi approved and signed into law the two bills, S.B. 3098 and H.B. 1491, (Mississippi Laws, 1978, Chapters 535 and 515).

24. In June, 1978, the District Court in *Connor* directed the parties to confer for the purposes of arriving at a settlement of the *Connor* v. *Finch* litigation pending in the Southern District of Mississippi. The Joint Committee participated in these negotiations. In response to the objections to the statutory plan by the *Connor* plaintiffs, the boun-

daries of a number of districts in the plan were altered by the staff of the Joint Committee and a settlement proposal was submitted to the Joint Committee. The Joint Committee then informally polled the members of the Mississippi Legislature (the Legislature not being in session) to determine whether this settlement proposal was acceptable. In August, 1978, a majority of both houses of the Mississippi Legislature by a vote of 80 to 13 in the House and 26 to 7 in the Senate voted in favor of accepting the *Connor* settlement plan as an alternative to the statutory plan. After this poll, the Joint Committee accepted the settlement plan and recommended to the defendants in *Connor* that they enter into a consent decree incorporating this settlement proposal.

25. On June 1, 1978, the Attorney General for the State of Mississippi, submitted the statutory plan to the Attorney General of the United States for federal preclearance pursuant to section 5 of the Voting Rights of 1965, 42 U.S.C. § 1973c. By letter of July 31, 1978, the Attorney General, by his designated agent Drew S. Days, III, the Assistant Attorney General in charge of the Civil Rights Division, rendered a timely objection pursuant to section 5 of the Voting Rights Act stating that "we have been unable to conclude that the submitted plans for the Mississippi Senate and House of Representatives do not have the purpose or effect of abridging the right to vote because of race or color." Letter from Drew S. Days, III, to Mississippi Attorney General A. F. Summer, July 31, 1978.

26. On August 1, 1978, Mississippi's Attorney General received, by telephone, notification of the Attorney General's objection. The same day, the State of Mississippi filed this action against the United States and Attorney General Griffin B. Bell seeking a declaratory judgment pursuant to section 5 of the Voting Rights Act.

27. On August 31, 1978, ten black citizens and registered voters of the State of Mississippi filed a motion to intervene as defendants and attached to their motion their proposed answer denying the material allegations of the complaint, denying that plaintiff was entitled to the relief requested, and alleging as an affirmative defense that the statutory plans "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the franchise" in violation of their rights secured by section 5 of the Voting Rights Act, and further that the statutory reapportionment plan dilutes, minimizes, and cancels out black voting strength in violation of intervenors' rights secured by the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. On September 18, the Court granted intervenors' motion for leave to intervene and to file their answer in intervention (order of September 18, 1978). As stated previously, this matter was subsequently heard during the weeks of September 18 through September 27. After proposed findings of fact and conclusions of law with accompanying briefs had been submitted, oral argument was conducted on January 16, 1979.

28. On March 26, 1979, the Supreme Court, upon a motion to seek a writ of mandamus, instructed the *Connor* court to issue a reapportionment plan forthwith, in accordance with its previous mandate in *Connor* v. *Finch*, 431 U.S. 407 (1977).

29. On April 13, 1979, the Southern District of Mississippi issued a final judgment in *Connor* v. *Finch* and adopted a slightly modified version of the settlement plan previously submitted to the court by the parties. It is undisputed that the resulting court-ordered plan is not substantially different from the settlement plan from which it was drawn.[1]

II. *Present Voting Conditions in Mississippi*:

30. Pursuant to its Constitution, Mississippi has maintained a bicameral legislature made up of a Senate and a House of Representatives. Members of each branch are elected quadrennially. The Constitution of Mississippi requires that the Senate consist of no less than 45 but no more than 55 members. Similarly, the Mississippi Constitution requires that

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[1] The court-ordered plan of April 13, 1979, while not in existence at the time this Court heard this case, is a matter of judicial notice. Throughout these Findings of Fact and Conclusions, it is treated as substantially identical to the settlement plan and has been so conceded by all parties. Defendant United States' letter to the Court of April 17, 1979 ("Substantially the same as the settlement plan") ; Defendant-intervenors [sic] supplemental memorandum of April 27, 1979 ("The court-ordered plan of April 13, 1979 orders the settlement plan into effect 'with three minor changes' which do not affect 'any of the majority black districts in the settlement plan.' ").

the House consist of no more than 122 members. The Senate currently consists of 52 members and the House consists of 122.

31. Any registered voter in Mississippi can have his or her name placed upon the ballot as an independent candidate in the general election for the Mississippi legislature by presenting a petition to the appropriate body designated in the statute signed by 50 registered voters 60 days before the quadrennial general election. Miss. Code Ann. § 3260 (1972). To be elected, a candidate thus nominated needs only a plurality in a general election, Miss. Code Ann. § 3279 (1972 & Supp. 1978) *as amended* by H.B. 44 (Chapter 429, Mississippi Laws 1978). A candidate for party nomination, on the other hand, must win a majority of the votes cast in order to win the nomination of his party. Miss. Code Ann. § 23-3-69 (1972).

32. According to the 1970 census, blacks in Mississippi comprise 36.8 percent of the total population of the state and 31.5 percent of the state's voting age population (hereinafter referred to as "VAP").

33. Mississippi has in the past used such devices as the literacy test, the poll tax and the white primary to exclude its black citizens from participation in the electoral process. Indeed, until passage of the Voting Rights Act in 1965, use of racially discriminatory tests and devices effectively excluded black people in Mississippi from exercise of the franchise. *Stewart* v. *Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) (per curiam); *United States* v. *State of*

Mississippi, 229 F. Supp. 925, 983, 987 (S.D. Miss. 1964), *rev'd and remanded*, 380 U.S. 128 (1965).

34. The effect of Mississippi's past history of racial discrimination in voting and other areas continues to affect black people in many portions of the state today, which has resulted in a generally lower participation by blacks than whites in the political process. Consequently, proportionally fewer blacks are registered to vote than whites, and black voters turn out at the polls at a lower rate than white voters.

35. Analysis of past election returns show that racial bloc voting has prevailed throughout the State of Mississippi. Those participating in the electoral process suggest that racial bloc voting continues to occur throughout the state today.

36. Low black voter registration and voter turnout combined with racial bloc voting make it necessary for an electoral district in Mississippi to contain a substantial majority of black eligible voters in order to provide black voters with an opportunity to elect a candidate of their choice. It has been generally conceded that, barring exceptional circumstances such as two white candidates splitting the vote, a district should contain a black population of at least 65 percent or a black VAP of at least 60 percent to provide black voters with an opportunity to elect a candidate of their choice.

37. Recent legislative reapportionments in Mississippi have failed to meet constitutional requirements and have been marked by the racially discriminatory use of multi-member districts. *Connor* v. *Williams*,

404 U.S. 549 (1972); *Connor* v. *Johnson*, 402 U.S. 690 (1971). Such uses of multi-member districts have, in the past, tended to submerge black population concentrations in heavily white concentrations.

38. The present legislature in Mississippi was elected pursuant to a 1975 temporary court-ordered plan containing multi-member districts.

39. Only four out of 122 house seats in the Mississippi legislature today are occupied by blacks. None of the 52 senate seats is occupied by blacks.

III. *Nature of the Statutory Plan*:

40. Viewing the state as a whole, and comparing the statutory plan with the demographic distribution of population among Mississippi's 82 counties, the evidence demonstrates that the plan, in overall statistical effect, reflects the geographic distribution of black population within the state.

41. The maximum deviation of S.B. 3098 is 11.39 percent. The maximum deviation of H.B. 1491 is 10.8 percent. These are consistent with the broader tolerances allowed legislatures, but not courts, in fashioning apportionment plans.[2]

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[2] Comparison of total deviations from population equality of the statutory plan with the settlement plan.

	Senate	House
State's Statutory Plan	11.39%	10.08%
Connor Settlement Plan	11.39%	9.94%

Total deviation, as used herein, is the total span of variances calculated by adding the largest plus variance and the largest minus variance.

42. Mississippi's counties are unequal in population. While 30.5 percent of Mississippi's counties have a majority black population, only 25.2 percent of the state's population live in those counties. 30.8 percent of the senate districts in S.B. 3098 have black majority populations. This percentage closely corresponds to the number of counties that have a majority black population.

43. 24.6 percent of the house districts have a majority black population. The percentage of black majority districts in H.B. 1491 is lower than the percentage of black majority districts in S.B. 3098 (30.8%) and the corresponding percentage of black majority counties (30.5%). Senate districts and counties, however, are larger geographically than the 122 house districts. The smaller house districts in H.B. 1491 contain greater densities of black population than do the larger geographic units. Black majority house districts in H.B. 1491 average 65.4 percent in black population while the corresponding figure for counties is 60.77 percent and for senate districts in S.B. 3098 is 59.3 percent.

44. The statutory plan enhances potential black voting strength when compared to the 1975 court-ordered plan. The statutory plan contains two more black VAP majority districts in the senate (10) and four more black VAP majority districts in the house (26) than the 1975 court-ordered plan. It also contains two districts in the senate with a black VAP of 60 percent or more and ten more districts in the

house (14) with a black VAP of 60 percent or more. Furthermore, the statutory plan contains single-member districts only.

45. A statistical comparison of the 1975 court-ordered plan with the statutory plan demonstrates the following with regard to black voting age population (VAP):

% Range	1975 Plan (No. of Dists House)	H.B. 1491 (No. of Dists House)	1975 Plan (No. of Dists Senate)	S.B. 3098 (No. of Dists Senate)
40-100%	40	38	14	16
45-100%	30	30	12	14
50-100%	22	26	8	10
55-100%	11	20	1	7
60-100%	4	14	0	2
65-100%	3	7	0	0
70-100%	3	3	0	0
75-100%	2	0	0	0
80-100%	1	0	0	0
86-100%	0	0	0	0

46. The following table contains statistical comparison of the statutory plan with the settlement plan adopted by the *Connor* Court on April 13, 1979, broken down to show the number of black majority districts and black VAP majority districts for both the Senate and the House:

	Connor Settlement Plan (Ex. P-35)	State's Statutory Plan (Exs. P-4A, 4B)
Black Pop. Majority Districts	49	46
Black VAP Majority Districts	39	36
HOUSE		
Black Pop. Majority Districts	34	30
65% +	18	15
60%-65%	5	6
55%-60%	5	5
50%-55%	6	4
Black VAP Majority Districts	28	26
65% +	9	7
60%-65%	6	7
55%-60%	7	6
50%-55%	6	6
SENATE		
Black Pop. Majority Districts	15	16
65% +	3	4
60%-65%	4	3
55%-60%	5	5
50%-55%	3	4
Black VAP Majority Districts	11	10
65% +	1	0
60%-65%	0	2
55%-60%	6	5
50%-55%	4	3

IV. *Defendant and Defendant-Intervenors' Objections to the Statutory Plan*:

47. Defendant and defendant-intervenors object, in particular, to the redistricting in the statutory plan of the following counties: [3]

1. *HOUSE PLAN*

(a) *Warren County*

The defendants and intervenors complain that, in the statutory plan's redistricting of Warren County,

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[3] We note that several of the defendant-intervenors find themselves in districts more heavily black under the *Connor* Settlement Plan than under the statutory plans. This fact, in addition to defendant-intervenors' preference for reapportionment by Court decree rather than reapportionment by the legislature, may largely provide the explanation for their intervention in this litigation. (See testimony of Aaron Henry, Tr. pp. 801-02).

STATUTORY PLAN

		SENATE		*HOUSE*	
NAME	COUNTY	POP.	VAP	POP.	VAP
Aaron Henry	Coahoma	Same	Same	Same	Same
Henry Kirksey	Hinds	65.44	62.93	Same	Same
Bennie Thompson	Hinds	42.01	35.41	46.30	39.21
Barney Schoby	Adams	Same	Same	63.23	60.63
David Jordan	Leflore	Same	Same	42.89	37.72
Fred Banks	Hinds	65.44	62.93	Same	Same
		SETTLEMENT PLAN			
Aaron Henry	Coahoma	Same	Same	Same	Same
Henry Kirksey	Hinds	72.33		Same	Same
Bennie Thompson	Hinds	49.71		66.79	59.02
Barney Schoby	Adams	Same	Same	69.40	66.45
David Jordan	Leflore	Same	Same	75.77	71.72
Fred Banks	Hinds	72.33		Same	Same

a heavy black population concentration is divided among three proposed house districts, turning a black majority into a black minority in all three districts. This expression of concern regarding the statutory configuration of Warren County was first reflected in the record during the January 10, 1978 deposition of Hofeller. This configuration was in draft form at the time of the public hearings and no objection had been raised. By that time, however, expert Hofeller's discretion was limited to simply converting the ED plan into a precinct plan. The opportunity to make basic changes to the configuration of districts was no longer open. The settlement plan, which addresses the problem, is thus only a marginal improvement insofar as blacks are concerned, a difference which would not translate into a difference in black representation. The Warren County districts in the settlement plan also remain below the 60% black VAP requisite for districts in which blacks are able to elect a candidate of their choice.

(b) *Hinds County*

The defendants and intervenors complain that the black population concentration in western Hinds County is fragmented, and the resulting three portions of that concentration are paired with greater white population concentrations in Clinton and the Jackson suburbs. In the settlement plan, the boundaries of the three districts that trisect rural Hinds County do not fracture the black concentration in the western portion of the county. As a result, the

settlement plan provides a district in rural Hinds County with a 69 percent black VAP. Representative Buckley, a black member of the Joint Committee from Hinds County and the other three black house members from Hinds County, apparently never raised the question of a majority black rural district prior to the legislature's action. The present objections to the redistricting of Hinds County were not brought to the Committee's attention until December, 1977. The Joint Committee originally intended to follow existing districts in the 1975 plan, which had been approved by the federal court, and to increase the number of black VAP districts from 3 to 5. Representative Buckley objected that such a plan would spread the black population too thinly. In response to Buckley's objection, the plan was changed by reducing the number of black majority seats to four. The enhancement now sought by the defendants and intervenors is of debatable benefit and departs from the traditional plan approved by the federal court, which drew lines from east to west rather than north to south. In addition, in order to create the black VAP in rural Hinds County, the settlement plan necessarily dilutes adjacent districts.

(c) *Adams County*

Defendants and intervenors object to the statutory plan's redistricting of Adams County because the only majority black supervisor's district is split between two districts. The black voting strength in north Adams is allegedly diluted by excluding the

majority black airport precinct from the north Adams district and by pairing north Adams and north Natchez with heavily white precincts. In the settlement plan, the two legislative districts that bisect Adams County leave the only black supervisor's district intact and entirely within the same legislative district, *i.e.*, district 95.

In a memorandum to the Legislative Committee on Reapportionment written by an associate of defendant-intervenors' counsel on behalf of Representative Buckley (hereinafter referred to as the "Barber Memorandum"),[4] Buckley requested a slight shift in the configuration of district 95. In response to Buckley's request, the Committee increased the black VAP in that district, but did not realize that intervenors would not be satisfied unless the Morgantown precinct were eliminated. The resulting increase of five percent in the black VAP of Adams County by excluding the Morgantown precinct, however, would be at the expense of diluting neighboring districts.

(d) *Leflore County*

Defendants and intervenors complain that the statutory plan fragments the southeast Greenwood black concentration. The greatest portion of that black community is paired with heavily white north Greenwood in a white majority district. The remaining black community is put in a predominantly rural dis-

[4] The vast majority of the suggestions contained in the Barber Memorandum was incorporated in the statutory plan. See plaintiff's reply brief, pp. 43-45 for detail.

trict, which, although majority black, does not have a high enough black VAP to enable blacks to elect candidates of their choice. The settlement plan keeps the black population concentration in south Greenwood intact (except for one heavily black ED) and entirely within one legislative district. The districts proposed in the settlement plan, however, are less compact to a considerable degree than the districts in the statutory plan and would also divide the city of Greenwood to a greater extent. The settlement plan increases the black VAP percentage from 64.26 percent to 71.22 percent, while it diminishes the influence of the blacks residing in the adjacent district.

(e) *Marshall County*

Defendants and intervenors object that the statutory plan for Marshall County splits the only supervisors' district which has elected a black supervisor in that county and that the voting strength of the black voters in the county's house district is diluted and minimized by the inclusion of the heavily white Holly Springs precinct No. 5. In the settlement plan, the black supervisor's district is placed almost entirely within district 5 with the result that blacks comprise 62 percent of the VAP. Prior to voicing these objections, however, the intervenors had indicated to the Committee a preference for keeping the city of Holly Springs intact. The configuration now preferred by the intervenors would split the city of Holly Springs. The sole difference between the plans lies in the allocation of one precinct. The result sought by the

intervenors would create a district with a black VAP 6 percentage points higher. This gain is at the expense of creating an irregular shaped district that splits the only major city in the district.

(f) *Desoto County*

Defendants and intervenors contend that the statutory plan avoids the creation of a black population majority district in Desoto County by dividing the county by a north/south boundary. The plan splits up the rural predominantly black portion of the county and includes in each district portions of the heavily white Memphis suburban area in north Desoto County. In the settlement plan, the black population concentration in rural Desoto is left intact. As a result, a majority black population district is created. The settlement plan, however, increases the black voting age population in the district it seeks to change by only 1.8 percent and fails to create a 50 percent black VAP majority. The record does not reflect when, if ever, this particular change was called to the attention of the legislature. Intervenors' initial plan, which they submitted to the *Connor* Court, is identical in its configuration of Desoto County as the statutory plan.

2. *SENATE PLAN*

(a) *Hinds County*

Defendants and intervenors contend that the statutory plan forms a "seahorse district" in its Hinds County Senate plan that pairs a portion of the central

Jackson black population with the heavily white south Jackson area. They contend that alternative plans proposed to the *Connor* Court are more compact and form black populations of over 60 percent in districts 25 and 26. There is no evidence that this change was ever called to the attention of the Committee prior to the enactment of the statutory plan. In any event, the change sought merely increases the black population in an already 60 percent black majority VAP district, a change of dubious benefit to black representation.

(b) *Holmes, Madison and Humphreys Counties*

Defendant and intervenors complain that out-migration of blacks in recent years from the Holmes, Madison and Humphreys County has resulted in decreasing the actual VAP percentage in the statutory plan's redistricting of the area to less than 60 percent. The settlement plan combines Holmes and Humphreys counties and the northern portion of Yazoo County. Defendants and intervenors contend that this configuration is more compact and would provide black voters with a better chance to elect a candidate of their choice. The record does not reflect any evidence that the requested combination of these counties in a single district was called to the attention of the Committee staff at any time prior to the passage of the statutory plans. In any event, the settlement plan would split Madison County across the middle and would dilute the vote in Yazoo County

and in north Madison. The change would result in a net decrease of one 60 percent black VAP majority district.

(c) *Washington, Sharkey and Issaquena Counties*

Defendants and intervenors contend that the statutory plan splits the heavy black concentration in north Greenville and north Washington County between two long, narrow districts, which stretch south for more than 60 miles. The resulting district 22 is majority white, and district 23, although majority black, is alleged to be so diluted that black voters are denied representation of their choice. The settlement plan creates a district that preserves much of the black population in urban Greenville intact within one district. Defendants and intervenors argue that although the settlement plan's district is only about 2 percentage points greater in black majority VAP, it provides black voters with a much better opportunity to elect a candidate because it comprises an urban area where blacks are generally better organized and more politically aware. Intervenor's expert testified that any district drawn in this area would look suspicious because of the small population in the rural areas. The drafters of the statutory plans attempted to draw a more compact plan than the predecessor 1975 plan. The resulting change increases the black VAP in one district by 1.42 percent. We find that the changes in the settlement plan are not significantly different from those created by the

statutory plan or ameliorative of the problem of formulating compact districts in the area.

(d) *Claiborne, Jefferson and Copiah Counties*

Defendants and intervenors object to the statutory plan's pairing of Jefferson and Claiborne counties with majority white Franklin County and the western half of Copiah County. Alternative plans submitted to the *Connor* Court excluded Franklin County or portions of Copiah. The *Connor* plaintiff's plan combined Jefferson and Claiborne with Copiah to form a district with a 55 percent black VAP. Under the statutory plan, however, the Jefferson and Claiborne County districts have a 75.77 percent black population. The intervenors conceded in their Barber Memorandum to the Joint Committee that the Claiborne/Jefferson area could not be hurt by either plan because of its high black voting age population.

48. The evidence demonstrates that the plaintiff's agents in formulating the statutory plan did not act with the intent or purpose of denying or abridging the right to vote of any citizen of Mississippi on account of race. Rather, the individuals involved in drafting and enacting the statutory plans acted with the purpose of creating black VAP majority districts.

49. The evidence demonstrates that differences in black voting strength provided in the statutory plan and in the *Connor* settlement plan are insubstantial. The statutory plan covering both the Senate and the House contains three (3) less black majority voting

districts.[5] Since there are 174 districts in the Mississippi legislature this is an overall difference of 1.7 percent (1.7%). For the Senate, the statutory plan contains one (1) more black majority district than the *Connor* settlement plan. More important, both plans provide the *same* number (16) of black, VAP majority districts with a population of 60 percent or more (see Finding 36 for the significance of this fact and Table in Finding 46 for critical figures). When compared to the settlement plan adopted by the *Connor* Court on April 13, 1979, the legislative plan is not retrogressive in overall black voting strength and does not have the effect of abridging or denying the right to vote of any citizen of Mississippi on account of race.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to hear and determine this case. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1974 & Supp. V 1975); 28 U.S.C. § 1396(a)(2) (1976); 29 U.S.C. § 2001 (1976).

2. This Court has been properly convened as a court of three judges. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1974 & Supp. V 1975) (hereinafter "section 5"); 28 U.S.C. § 2284 (1976).

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[5] In these three districts, the black majority is less than 60 percent VAP. As "influence districts," they, standing alone, do not represent a significant difference, according to the Assistant Attorney General of the United States for Civil Rights, such as to suggest an improper purpose under section 5. (Day's depo., Pltf's Ex. 25, Tr. pp. 112-115).

3. All the requirements for a Rule 23(a) and 23(b)(2) defendant class action on behalf of the intervenors are met. The defendant class is defined as all black citizens and black registered voters in Mississippi qualified to vote in state legislative elections. Fed.R.Civ.P. 23(a) & 23(b)(2).

4. The Voting Rights Act of 1965, 42 U.S.C. § 1973 *et seq.* (1974), was enacted to insure the protection of rights guaranteed by the Fifteenth Amendment and "to rid the country of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966).

5. Section 5 of the Voting Rights Act was intended to insure that the gains thus far achieved in minority political participation would not be emasculated or destroyed through new discriminatory procedures and techniques. S. Rep. No. 94-295, at 19.

6. The State of Mississippi is a state subject to the preclearance requirements of section 5. 30 Fed. Reg. 9897 (August 7, 1965).

7. Under section 5, Mississippi may not enforce or implement any change in "any voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting" unless such change has either been approved by the Attorney General, or unless Mississippi obtains a declaratory judgment in the United States District Court for the District of Columbia that such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c (1974 & Supp. V. 1975).

8. The reapportionment plan adopted by the Mississippi Legislature in 1978 regular session, approved by the Governor on April 12, 1978, and the changes resulting therefrom are within the scope of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1974 & Supp. V. 1975); *Georgia* v. *United States*, 411 U.S. 526, 531-35 (1973); *Beer* v. *United States*, 425 U.S. 130, 138 (1966).

9. In an action for declaratory judgment under section 5, the burden of proof is on the plaintiff. *Georgia* v. *United States*, 411 U.S. 526, 538 (1973); *South Carolina* v. *Katzenbach*, 383 U.S 301, 328 (1966).

10. Plaintiff's burden in a suit for declaratory relief under section 5 is to demonstrate that the reapportionment plan described in S.B. 3098 and H.B. 1491 do not lead to a retrogression in the position of racial minorities, or that the proposed change fairly reflects the strength of black voting power as it exists. *Beer* v. *United States*, 425 U.S. 130, 139 n. 11, 141 (1976); *Richmond* v. *United States*, 422 U.S. 358, 362 (1975).

11. Mississippi, in meeting its burden of proof, must demonstrate that a racially discriminatory purpose was not among the factors that motivated it in devising its reapportionment plan. *Richmond* v. *United States*, 422 U.S 358, 362 (1975).

12. A discriminatory purpose need not be express, but may be inferred from the totality of the relevant facts. *Washington* v. *Davis*, 426 U.S. 229, 241 (1976).

13. Black voting strength is impermissibly diluted when, designedly or otherwise, an apportionment scheme under the circumstances of a particular case would operate to minimize or cancel out the voting strength of racial elements of the voting population. *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966); *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965).

14. In a single-member districting plan, black voting strength may be unconstitutionally and impermissibly diluted, minimized, and cancelled out (1) when heavy black population concentrations are unnecessarily fragmented and dispersed, and (2) when black population concentrations to deny [sic] black voters the opportunity to elect candidates of their choice. *Connor* v. *Finch*, 431 U.S. 407, 421-25 (1977); *Kirksey* v. *Board of Supervisors of Hinds County, Mississippi*, 554 F.2d 139, 149 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977); *Robinson* v. *Commissioners Court, Anderson County, Texas*, 505 F.2d 674, 679 (5th Cir. 1974); *Moore* v. *Leflore County Board of Election Commissioners*, 502 F.2d 621, 622-24 (5th Cir. 1974); *Sims* v. *Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (three-judge court).

15. No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength. *Richmond* v. *United States*, 422 U.S. 358, 370-72 (1975); *Gilbert* v. *Sterrett*, 509 F.2d 1389, 1394 (5th Cir. 1975); *Cousins* v. *City Council*

of the City of Chicago, 503 F.2d 912, 920 (7th Cir. 1974); *Turner* v. *McKeithen*, 490 F.2d 191, 197 (5th Cir. 1973); *Howard* v. *Adams County Board of Supervisors*, 453 F.2d 455, 458 (5th Cir. 1972).

16. A legislative reapportionment plan that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise cannot have "the effect" of diluting or abridging the right to vote on account of race within the meaning of section 5 unless the new apportionment itself so discriminates as to violate the Constitution. *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

17. Although reapportionment plans, which are formulated with less concern for statistical accuracy and the one-person-one-vote concept, may provide a greater number of black majority districts, departure from equal protection one-person-one-vote strictures cannot be required or justified simply as an affirmative act to maximize black voting strength. *See Regents* v. *Bakke*, 98 S. Ct. 2733, 2751 (1978); *Mahan* v. *Howell*, 410 U.S. 315, 328-30 (1973); *White* v. *Weiser*, 412 U.S. 783, 790-93 (1973).

18. *Beer* commands comparison with a preexisting plan to determine "whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting . . ." *Beer* v. *United States*, 425 U.S. 130, 141 (1976).

19. The settlement plan, adopted by the *Connor* Court on April 13, 1979, must now be considered the

preexisting plan and the benchmark with which to compare the statutory plan.[6]

20. When compared with the *Connor* Settlement Plan, and taking into account the totality of criteria governing the formulation of the statutory plan and its alternatives, we conclude that the slight differences are not of such significance to find that the statutory plan is retrogressive with respect to black voting strength in Mississippi as it exists today. The proof in this case demonstrates that H.B. 1491 and S.B. 3098 would not lead to a retrogression in the current position of racial minorities with respect to their effective exercise of the electoral franchise and therefore do not have the "effect of denying or abridging the right to vote on acount of race or color." This conclusion to disregard insignificant differences is further supported by the fact that legislative reapportionment is the preferred vehicle for reapportionment, as is reflected by the broader tolerances which are allowed to legislatures, but not to courts, in the matter of deviations from uniform population requirements. As the Supreme Court recently stated, "The

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[6] When compared with the 1975 plan, S.B. 3098 and H.B. 1491 constitute a clear enhancement of the position of racial minorities with respect to their effective exercise of the electoral franchise because S.B. 3091 and H.B. 1491 have a greater number of black voting age majority districts than did the 1975 plan and they provide higher percentages of black vote strength in those districts than did the 1975 plan. Moreover, the statutory plan is the first plan to utilize single-member districts only and avoids the diluting effect of multi-member districts.

Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal Courts should make every effort not to pre-empt." *Wise* v. *Lipscomb*, 437 U.S 535, 539 (1978).

21. Legislative reapportionment plans must be scrutinized to determine if they were enacted with the prohibited "purpose" of denying or abridging black voting strength. The prohibited "purpose" of section 5 may be described as the sort of invidious discriminatory purpose that would support a challenge to official action as an unconstitutional denial of equal protection. A law neutral on its face and serving legitimate state ends cannot be held invalid under the Equal Protection Clause without proof of discriminatory purpose. Accordingly, in examining the statutory plan, proof of discriminatory racial purpose is necessary for a finding of the "purpose" proscribed in section 5. *Washington* v. *Davis*, 426 U.S. 229, 239-48 (1976).

22. Mississippi's evidence demonstrates that the principal actors in the development of S.B. 3098 and H.B 1491 acted with a benign purpose.[7] Defendants concede they have no evidence to the contrary and are unable to name anyone they contend acted with improper purpose. Defendant-intervenors, likewise, have failed to introduce such evidence.

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[7] The basic configuration of the statutory plan was complete in December, 1977, well prior to the submission to the *Connor* Court of various alternative plans, which culminated in the settlement plan adopted by the *Connor* Court on April 13, 1979.

23. Defendants and defendant-intervenors have suggested that incumbency concerns in the fashioning of the legislature's plans resulted in an impermissibly racially-discriminatory purpose. It is not improper, however, for a legislative body to consider incumbency in fashioning a reapportionment plan, nor does it demonstrate invidiousness, especially here where the evidence shows incumbency concerns were not permitted to encroach upon configurations designed to recognize and protect black voting strength. *White* v. *Weiser*, 412 U.S. 783, 797 (1973); *Burns* v. *Richardson*, 384 U.S. 73, 89 n. 16 (1966).

24. The implementation of S.B. 3098 and H.B. 1491 for the 1979 quadrennial legislative elections in the State of Mississippi will not have either the purpose or effect of denying or abridging the full and free exercise of the right to vote of black citizens in that state.

25. Plaintiff's prayer for a declaratory judgment preclearing S.B. 3098 and H.B. 1491 as a valid reapportionment plan for use in the 1979 quadrennial election should be granted.

26. Since the statutory plan is upheld, it shall supersede the *Connor* Court plan of April 13, 1979. *Per curiam* opinion of the United States Supreme Court in *Connor* v. *Coleman*, No. 78-1013 decided March 29, 1979, 47 U.S.L.W. 3634.

An order consistent with the foregoing Findings of Fact and Conclusions of Law has been entered this day.

/s/ Malcolm Richard Wilkey
United States Circuit Judge

/s/ J. H. Pratt
United States District Judge

/s/ June L. Green
United States District Judge

June 1st, 1979.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1425

[Filed June 1, 1979]

STATE OF MISSISSIPPI, PLAINTIFF,

vs.

UNITED STATES OF AMERICA and GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, individually and in his official capacity, DEFENDANTS.

ORDER

Plaintiff filed this action on August 1, 1978, pursuant to 42 U.S.C. § 1973c seeking a declaratory judgment that Miss. Laws, 1978, Chs. 515 and 535, H.B. 1491 and S.B. 3098, the statutory reapportionment plan, do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. Defendants filed their answer denying that plaintiff was entitled to the relief requested, and the Court allowed ten black Mississippi voters to intervene in this action as defendants on behalf of the class of all black citizens and black registered voters of Mississippi qualified to vote in state legislative elections. The Court having held a hearing and having conducted oral argument on the matter and having issued its findings of fact and conclusions of law, it is, in accordance with the

Court's findings of fact and conclusions of law, this 1st day of June, 1979,

ORDERED, that plaintiff's prayer for a declaratory judgment that Miss. Laws, 1978, Chs. 515 and 535, H.B. 1491 and S.B. 3098, the statutory reapportionment plan, do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color is granted; and it is further

ORDERED, that this action be and hereby is dismissed.

/s/ Malcolm Richard Wilkey
United States Circuit Judge

/s/ J. H. Pratt
United States District Judge

/s/ June L. Green
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 78-1425

[Received June 13, 1979]

STATE OF MISSISSIPPI, PLAINTIFF,

v.

UNITED STATES OF AMERICA and GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS,

and

AARON E. HENRY, ET AL., DEFENDANT-INTERVENORS

NOTICE OF APPEAL

Please take notice that the United States of America and Griffin B. Bell, Defendants in this action, hereby appeal to the United States Supreme Court the final declaratory judgment of the three-judge district court entered on June 1, 1979. The appeal is taken pursuant to 42 U.S.C. 1973c.

UNITED STATES OF AMERICA
and GRIFFIN B. BELL

/s/ Miriam R. Eisenstein
MIRIAM R. EISENSTEIN
Attorney
Department of Justice
Washington, D.C. 20530

CERTIFICATE OF SERVICE

I, the undersigned Miriam R. Eisenstein hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Notice of Appeal to the following:

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